IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-472

NICHOLAS BUR,

Petitioner,

v.

HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER and DENNIS CHIPMAN,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS, HAROLD A. BREIER, CHARLES GILBERT AND DENNIS KOCHER, IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the doctrine of *respondeat superior* applicable to claims under 42 U.S.C. §1983?

2. Did the arrest by respondents Gilbert and Kocher, pursuant to an arrest warrant valid on its face, violate rights of the petitioner protected by 42 U.S.C. §1983?

3. Was the arrest of the petitioner by respondents Gilbert and Kocher effectuated with excessive force because the petitioner was placed in handcuffs?

STATEMENT OF CASE

The statement of facts applicable here is set forth in the District Court's Opinion which is included with the petition for review at A.9 through A.13.

Those facts can be summarized as follows:

On October 5, 1971, petitioner was issued a traffic citation and complaint charging him with a violation of Secton 341.04, Wisconsin Statutes. The citation notified the petitioner that he was required to appear in Branch 3 of the Milwaukee County Court at 8:30 A.M. on November 30, 1971. Petitioner failed to appear on that date. Upon petitioner's failure to appear, a County Judge from Milwaukee County ordered that a warrant be issued for his arrest. That warrant was issued on February 4, 1972.

On February 11, 1972, respondents Charles Gilbert and Dennis Kocher, officers of the Milwaukee Police Department, were dispatched to the respondent's place of employment for the purpose of arresting the respondent pursuant to the command of the warrant. Re-

spondents Gilbert and Kocher met with the petitioner, advised him of the existence of the warrant and placed him under arrest. During the course of the arrest, there was a limited struggle between the petitioner and the arresting officers, whereupon handcuffs were placed on the petitioner.

ARGUMENT

As is indicated by Rule 19 of this Court, a review on certiorari is not a matter of right, but of sound judicial discretion. Such review will be granted only where there are special and important reasons therefor. The character of reasons to be considered is set forth in Rule 19(b). The petition before the Court totally fails to demonstrate or discuss, within the guidelines of Rule 19(b), reasons why this Court should issue a writ of certiorari.

The arguments contained in the petition with respect to respondents Harold Breier, Charles Gilbert and Dennis Kocher are not sufficient to warrant the exercise of this Court's discretion in issuing a writ of certiorari.

I. APPLICATION OF THE DOCTRINE OF *RESPONDEAT SUPERIOR* TO RESPONDENT HAROLD A. BREIER IS NOT SUFFICIENT TO STATE A CLAIM UNDER 42 U.S.C. §1983

Petitioner, Nicholas Bur, does not assert that respondent Harold A. Breier, Chief of Police of the City of Milwaukee, personally participated in an alleged violation of rights secured by 42 U.S.C. §1983. Petitioner does not assert that said respondent had personal knowledge of, acquiesced in or ratified the alleged violations. Further, the petition contains no assertion that there was an affirmative link between the allegations of police misconduct and the adoption and enforcement of deliberate policies by said respondent showing his authorization or approval of such misconduct.

It can only be concluded that petitioner's request for the issuance of a writ of certiorari with respect to respondent Breier is predicated on the doctrine of *respondeat superior*. That doctrine as the basis for a claim under 42 U.S.C. §1983 was specifically rejected by both the District Court and the Seventh Circuit Court of Appeals (A. 4 and A. 33).

Support for the rejection of *respondeat superior* by the lower courts is found in *Rizzo v. Goode* (1976), 423 US 362, 46 L Ed 2d 561, 96 S Ct 598 wherein it is stated at pp. 375-377:

> "The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the ac-

> tions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in Hague and Medrano. Respondents posit a constitutional 'duty' on the part of petitioners (and a corresponding 'right' of the citizens of Philadelphia) to 'eliminate' future police misconduct; a 'default' of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the 'right' at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in §1983. We have never subscribed to these amorphous propositions, and we decline to do so now.
>
> "* * *
>
> "Respondents, in their effort to bring themselves within the language of Swann, ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two

respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as Swann and Brown were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. Under the well-established rule that federal 'judicial powers may be exercised only on the basis of a constitutional violation,' Swann, supra, at 16, 28 L Ed 2d 554, 91 S Ct 1267, this case presented no occasion for the District Court to grant equitable relief against petitioners."

Rejection of the application of *respondeat superior* to claims under 42 U.S.C. §1983 is contained in numerous decisions by Circuit Courts of Appeal. *Dunham v. Crosby* (1st Cir. 1970), 435 F 2d 1177, 1180; *Johnson v. Glick* (2nd Cir. 1973), 481 F 2d 1028, 1034, cert. den. 414 US 1033; *Adams v. Pate* (7th Cir. 1971), 445 F 2d 105, 107; *Jennings v. Davis* (8th Cir. 1973), 476 F 2d 1271, 1274; *Draeger v. Grand Central, Inc.* (10th Cir. 1974), 504 F 2d 142, 145.

On page 12 of his petition, petitioner suggests that respondent Breier was personally involved in the alleged violation of rights secured under the Constitution because he continued to sanction the criminal prosecution of the petitioner for 18 months after receiving a written notice of claim wherein petitioner asserted his innocence. The determination to institute or continue a criminal action or a forfeiture action is a determination properly made by a prosecutor, not by the Chief of Police.

II. THE ARREST OF PETITIONER BY RESPONDENTS GILBERT AND KOCHER PURSUANT TO A VALID ARREST WARRANT DID NOT VIOLATE THOSE RIGHTS OF PETITIONER SECURED BY 42 U.S.C. §1983.

With respect to respondents Charles Gilbert and Dennis Kocher, City of Milwaukee police officers, petitioner seeks a writ of certiorari to review the validity of his arrest by said respondents on February 11, 1972. That arrest was made pursuant to an arrest warrant issued by a Judge of the County Court of Milwaukee County after the petitioner failed to appear in that court in response to a traffic citation and complaint.

Petitioner has not asserted previously, nor does he assert here, that the warrant was in

any way defective. Rather, petitioner asserts that the arrest pursuant to the warrant was invalid because he was innocent of the charge contained therein.

It is respectfully submitted on behalf of respondents Gilbert and Kocher that petitioner's arrest pursuant to a valid warrant was lawful regardless of his guilt or innocence of the charge contained therein.

Support for this proposition requires little citation. It is stated in 32 *Am Jur* 2d, False Imprisonment, §67, at page 129:

> "An officer is protected and justified in executing process fair on its face — that is, process that is issued by a court, magistrate, or body having authority of law to issue process of that nature, is legal in form, and contains nothing to notify or fairly apprise the officer that it is issued without authority. If the process is fair on its face it matters not that it is irregular, and voidable for such irregularity. . . ."

See also Rule 4, Federal Rules of Criminal Procedure; *Morrison v. United States* (D.C. Cir. 1958), 262 F 2d 449; *Fleming v. McEnany* (2nd Cir. 1974), 491 F 2d 1353; *Mayer v. Moeykens* (2nd Cir. 1974), 494 F 2d 855, cert. den. 417 US 926.

Respondents Gilbert and Kocher had a duty to arrest the petitioner pursuant to the command of the court contained in the warrant.

As this Court stated in *Pierson v. Ray* (1967), 386 US 547, 18 L Ed 2d 288, 87 S Ct 1213 at page 556:

> ". . . A policeman's lot is not so unhappy that he must choose between being charged with dereliction of his duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. . . ."

III. USE OF HANDCUFFS IN EFFECTUATING HIS ARREST DID NOT VIOLATE PETITIONER'S RIGHTS PROTECTED UNDER 42 U.S.C. §1983.

In addition to the claim that his arrest on February 11, 1972, by respondents Gilbert and Kocher was invalid, petitioner asserts that the force used in effectuating that arrest was excessive because he was placed in handcuffs. As was indicated in the opinion of the Seventh Circuit Court of Appeals, petitioner admitted some physical resistance to the arrest (A.6), therefore, it is respectfully submitted that the minimal force used by respondents Gilbert and Kocher in placing handcuffs on the wrists of petitioner was warranted.

Even without physical resistance, the use of handcuffs by a law enforcement officer while making an arrest, without more, is not sufficient to state a claim under 42 U.S.C. §1983 irrespective of the validity of the arrest. Once a law enforcement officer determines that an

arrest is necessary, that officer has the obligation to insure that the custody of the individual arrested is maintained and that the safety of the person arrested, of other officers and of other people in the vicinity of the arrest is assured. The law enforcement officer should be the sole judge of the necessity for handcuffs, absent a claim that he abused the use of those handcuffs by intentionally inflicting physical injury.

CONCLUSION

Based on the reasons set forth herein, it is respectfully submitted on behalf of respondents Harold A. Breier, Charles Gilbert and Dennis Kocher that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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